Filed 2/24/09 Jenny v. State Farm General Ins. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RONALD L. JENNY et al., Plaintiffs and Appellants, v. STATE FARM GENERAL INSURANCE COMPANY, Defendant and Respondent.	B205028 (Los Angeles County Super. Ct. No. BC352911)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

George Chuang & Associates and George Chuang for Plaintiffs and Appellants Ronald L. Jenny, Jane E. Jenny and CCC SurfView LLC.

Crandall, Wade & Lowe and William R. Lowe for Defendant and Respondent State Farm General Insurance Company.

Ronald L. Jenny, Jane E. Jenny and CCC Surf View, LLC (Surf View) appeal from the judgment entered after the trial court granted summary judgment in favor of State Farm General Insurance Company (State Farm) in their lawsuit asserting State Farm breached its duty to defend its insureds. We affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *The Underlying Action and the Complaint for Breach of the Duty To Defend*

In May 2001 the Jennys, husband and wife, purchased an eight-unit apartment building on Clara Street in Port Hueneme. The Jennys subsequently transferred the property to the Jenny Property Family Trust. In October 2003 the property was again transferred, this time to Surf View, one of the limited liability companies the Jennys had formed for ownership of their income-producing property. The Jennys, doing business as Jenny Enterprises, managed the property, which included making, or hiring others to make, repairs to the apartment building.

On March 24, 2004 escrow opened for the sale of the Clara Street property to Jean Palmer-Daley and Patrick Daley. Following the close of escrow, the Daleys sued the Jennys and Surf View, among others, in Ventura County Superior Court. According to the Daleys' third amended complaint filed on November 20, 2006, a termite report obtained by the Daleys during escrow had identified fungus damage on the bathroom floor of unit number seven and recommended the floor be opened for inspection to reveal possible hidden defects or damage. Surf View agreed to open the floor in a letter dated April 24, 2004, as well as to complete various other repairs listed in the termite report. On May 23, 2004 Ronald Jenny signed a statement on behalf of Surf View stating it was not aware of any material facts or defects that had not been disclosed to the Daleys. On May 27, 2004 the deed transferring the Clara Street property to the Daleys was recorded.

In late October or early November 2004 the Daleys inspected unit number three after the tenant had vacated the unit and discovered severe water stains and damage in the bathroom, which is immediately below the bathroom in unit number seven. Construction and environmental consultants retained by the Daleys then discovered, although the ceiling drywall in unit number three appeared new, there was extensive mold, wood rot

and corrosion of metal piping behind the walls of the unit. The Daleys alleged the water stains had been caused by leaks in the shower/tub and toilet fixtures in unit number seven's bathroom. Based on these findings, the Daleys asserted claims including fraud, fraudulent concealment, negligent misrepresentation, nuisance and "negligent repair and concealment"[1] based on the theory the Jennys had opened up the ceiling in unit number three in the beginning of 2004, discovered the extensive damage and concealed it by covering and enclosing it with new drywall and paint.

The Jennys and Surf View tendered the defense of the Daleys' action to State Farm, which had issued several commercial and personal policies insuring the Jennys and the property. State Farm declined to defend the Jennys and Surf View, primarily relying on numerous California decisions (and federal decisions applying California law) holding an insurer is not obligated under the policies at issue to defend claims arising out of the sale of property because such claims involve only noncovered, economic damages. (See *Miller v. Western General Agency, Inc.* (1996) 41 Cal.App.4th 1144, 1151 [in action based upon sellers' failure to disclose defective plumbing, claims gave rise to uncovered "pecuniary loss -- the loss in fair market value of [buyers'] new home"]; *Devin v. United Auto Ass'n* (1992) 6 Cal.App.4th 1149, 1158-1159 [injury from intentional and negligent misrepresentations made in sale of home allegedly slipping and sinking was "not an injury to *tangible* property within the meaning of a liability policy, because damages for fraud are ordinarily limited to recovery of economic injuries"]; *Warner v. Fire Ins. Exchange* (1991) 230 Cal.App.3d 1029, 1034-1035 [misrepresentations made in sale of home gave rise to uncovered claims for economic damages]; *Safeco Ins. Co. of America v. Andrews* (9th Cir. 1990) 915 F.2d 500, 502 ["[Buyer's] claims do not expose [seller] to liability for any damage to tangible property, but rather for economic loss resulting from [seller's] alleged failure to discover and disclose facts relevant to the property's value and desirability. Such harm is outside the scope of the policy."]; *Allstate Ins. Co. v. Miller*

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[1] Although captioned as a claim for negligent repair and concealment, the cause of action is essentially one for negligence.

(N.D.Cal. 1990) 743 F.Supp. 723, 726 ["only damages recoverable for negligent misrepresentation are economic or contractual losses outside the meaning of 'property damages' under the policy"].)

On May 24, 2006 the Jennys and Surf View filed a complaint, amended on September 12, 2006, against State Farm, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing and declaratory relief based on State Farm's purported wrongful refusal to provide a defense in the Daleys' action.[2]

2. *The Trial Court's Order Granting Summary Judgment in Favor of State Farm*

At a hearing on State Farm's motion for summary judgment on June 8, 2007, the Jennys and Surf View contended Surf View, not the Jennys, had sold the property and asserted the Daleys' claims for nuisance and negligence were independent of, and distinguishable from, the seller-based claims for which only economic damages would be available. The trial court expressed its tentative ruling that the negligence claim was "all part of the failure to disclose. I don't think that really triggers coverage just because you call it . . . negligence that is still part of that misrepresentation." As for the nuisance claim, the trial court stated it was not convinced there was coverage, but continued the hearing to give the parties an opportunity to resolve the case through mediation.

The parties were unable to settle the case. At the continued hearing on July 17, 2007 the trial court granted State Farm's motion for summary judgment, stating, "I tend to agree with State Farm's analysis of the Daley[s'] case, that it's really all premised on . . . claims . . . based on this contract sale that basically it's the sale of just the structure. It's not allegedly what it was meant to be."

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[2] The complaint also asserted claims against State Farm insurance agent Darvin Howell for professional negligence and breach of fiduciary duty. The trial court granted summary judgment in favor of Howell, and the Jennys and Surf View have not appealed dismissal of the claims against Howell.

CONTENTIONS

The Jennys and Surf View contend the Daleys' claims for nuisance and negligence are covered claims for property damage and personal injury under the policies because the Jennys were not the sellers of the property and those claims, which are not based on fraud, seek noneconomic damages.[3]

DISCUSSION

1. *Generally Applicable Legal Standards*

A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that [the party] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In a duty to defend case, an insurer moving for summary judgment "must establish the absence of any . . . potential" for coverage, that is, that the underlying complaint "'can by no conceivable theory raise a single issue which could bring it within the policy coverage.'" (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300, italics omitted.) "When determining whether a particular policy provides a potential for coverage and a duty to defend, we are guided by the principle that interpretation of an insurance policy is a question of law" to which the fundamental rules of contract interpretation apply. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 (*Waller*).)[4] "The appellate court is

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[3] The Jennys do not contend the Daleys' seller-based fraud and negligent misrepresentation claims are covered under the policies.

[4] "The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties. 'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.)'" (*Waller, supra*, 11 Cal.4th at p. 18.) "When interpreting a policy provision, we give its words their ordinary and popular sense except when they are used by the parties in a technical or other special sense." (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204.) "A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. [Citation.] But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot

not bound by the trial court's interpretation. Rather, it must independently interpret the language of the insurance contract." (*Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 45.)

"[A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. [Citations.] This duty, which applies even to claims that are 'groundless, false, or fraudulent,' is separate from and broader than the insurer's duty to indemnify." (*Waller, supra,* 11 Cal.4th at p. 19.) Although the duty to defend is broad, and any doubt as to whether the facts give rise to it is resolved in the insured's favor, the duty is nevertheless not unlimited; "it is measured by the nature and kinds of risks covered by the policy." (*Ibid*.; accord, *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081.)

"[T]he determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy." (*Waller, supra,* 11 Cal.4th at p. 19.) But whether a particular claim falls within the coverage of a liability policy is not affected by the form of the legal proceeding or the legal theories asserted by the injured party. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 841.) The scope of the duty instead rests on whether the alleged facts or extrinsic facts made known to the insurer at the inception of the third party lawsuit reveal a possibility that the claim may be covered by the policy. (*Waller,* at p. 19; *Montrose Chemical Corp. v. Superior Court, supra,* 6 Cal.4th at p. 295.) Even the existence of a potential for coverage of one claim triggers a duty to defend the entire action,

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be found to be ambiguous in the abstract." (*Waller,* at p. 18.) "[W]here the policy is clear and unequivocal, the only thing the insured may 'reasonably expect' is the coverage afforded by the plain language of the mutually agreed-upon terms." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2008) ¶ 4:12, p. 4-3 (rev. #1, 2008); see *VTN Consolidated, Inc. v. Northbrook Ins. Co.* (1979) 92 Cal.App.3d 888, 892 [insurance policy "must be construed from the language used and . . . where . . . its terms are plain and unambiguous, the courts have a duty to enforce the contract as agreed upon by the parties"].)

notwithstanding the action may include claims that are not potentially covered. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 48.) Moreover, the claims that are potentially covered need not predominate to trigger the insurer's duty to defend. (*Horace Mann Ins. Co. v. Barbara B., supra*, 4 Cal.4th at p. 1084 ["[w]e look not to whether noncovered acts predominate in the third party's action, but rather to whether there is *any* potential for liability under the policy"].)

2. *The Trial Court Properly Granted State Farm's Motion for Summary Judgment*

The State Farm policies[5] provide coverage for sums its insureds become legally obligated to pay as damages "because of **bodily injury, property damage, personal injury or advertising injury** to which this insurance applies. . . . This insurance applies only: [¶] 1. to **bodily injury** or **property damage** caused by an **occurrence** which takes place in the **coverage territory** during the policy period; [¶] 2. to **personal injury** caused by an **occurrence** committed in the coverage territory during the policy period. The **occurrence** must arise out of the conduct of your business, excluding advertising, or publishing, broadcasting or telecasting done by or for you . . . ."

Although coverage for both property damage and personal injury is triggered by an "occurrence," that term has different definitions for the two types of coverage. "**[O]ccurrence** means: [¶] a. an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in **bodily injury** or **property damage**; or [¶] the commission of an offense, or a serious of similar or related offenses, which results in **personal injury** or **advertising injury**."

The Jennys and Surf View contend State Farm had a duty to defend the Daleys' action under both the property damage and personal injury coverage. Neither claim has merit: There is no property damage coverage because the Daleys' claims are not based

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[5] Although the Jennys were issued several policies that might provide coverage, including an apartment policy for the Clara Street property and a commercial liability umbrella policy, the relevant policy provisions are indistinguishable for purposes of our analysis.

on an "accident"; there is no personal injury coverage because the only claims at issue are for "property damage."

a. *The Daleys' claim for negligence does not arise out of an "accident" under the policy*

An "occurrence" for purposes of property damage coverage under the relevant policy provisions means "an accident." "Unless the term 'accident' is otherwise defined in the policy, it is given a commonsense interpretation: i.e., an 'unintentional, unexpected, chance occurrence.'" (*Modern Development Co. v. Navigators Ins. Co.* (2003) 111 Cal.App.4th 932, 940, fn. 4; accord, *Stellar v. State Farm General Ins. Co.* (2007) 157 Cal.App.4th 1498, 1505 ["'Although the term "accident" is not defined in the policy, courts have consistently defined the term to require unintentional acts or conduct. [Citations.] The plain meaning of the word "accident" is an event occurring unexpectedly or by chance.'"].) Moreover, "where the insured intended all of the acts or events that resulted in the victim's injury, the event may not be deemed an 'accident' merely because the insured did not intend to cause injury." (*Merced Mutual Ins. Co. v. Mendez, supra,* 213 Cal.App.3d at p. 50; see *Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 599 [no coverage when "acts asserted to give rise to the underlying claimant's injuries were deliberate, regardless of whether any harm was intended or expected to come of them"]; see generally Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2008) ¶ 7:46, p. 7A-16 (rev. #1, 2008).) "In such cases, coverage turns on the insured's *intent to perform the act*, not on his or her state of mind in performing it. Whether the insured expected or intended the conduct to cause harm is *irrelevant*." (Croskey, *supra,* ¶ 7:46.1, p. 7A-16.) "An accident . . . is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage." (*Merced Mutual Ins. Co.*, at p. 50.)

When an insured's conduct is not accidental or unintended, coverage does not exist simply because the injured party brings negligence-based causes of action. "'Negligence' does not necessarily equate with an 'accident.'" (*Quan v. Truck Ins.*

Exchange, *supra*, 67 Cal.App.4th at p. 596; *ibid*. ["'[n]egligent' or not, in this case the insured's [sexual misconduct] alleged to have given rise to the claimant's injuries is necessarily nonaccidental, not because any 'harm' was intended, but simply because the conduct could not be engaged in by 'accident"']; see also *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, 9 [wrongful eviction action not covered by the policy, despite additional allegations of negligence, because insured intentionally caused termination of injured party's tenancy]; *American Internat. Bank v. Fidelity & Deposit Co.* (1996) 49 Cal.App.4th 1558, 1573 [rejecting argument that all claims for negligence are at least potentially covered in case including negligent misrepresentation allegations because that cause of action necessarily involves intentional conduct]; cf. *St. Paul Fire & Marine Ins. Co. v. Superior Court* (1984) 161 Cal.App.3d 1199, 1202 [no coverage under an accident-based policy for wrongful termination because the termination was not an "unintentional, unexpected, chance occurrence"].)

In their claim for negligence the Daleys alleged the "Jennys, acting through Jenny Enterprises," "had the duty to exercise reasonable care in connection with making repairs to the conditions of the property, including, but not limited to, the conditions in the walls of Unit #1, the walls and ceiling of Unit #3, and the floors and walls of Unit #7. Said Defendants breached said obligation and negligently performed repairs, and, in the process thereof, concealed defective conditions in the property." Thus, the Daleys alleged the Jennys had engaged in intentional conduct, that is, making the repairs, or supervising the repairs to the extent made by others, that resulted in damage to the property. There was no additional, unexpected, independent or unforeseen happening resulting from that intentional conduct that allegedly caused the damage. (Even if the alleged concealment of the damage was unintended, the damage itself was the product of the intended conduct -- making the repairs to the property.) Accordingly, the Daleys' negligence claim is not one arising out of "an accident" and does not trigger State Farm's duty to defend the Jennys. (See *Ray v. Valley Forge Ins. Co*. (1999) 77 Cal.App.4th 1039, 1046 [claim that roofing consultant provided bad advice was not an "accident" under policy because complaint alleged consultant intended client use materials he

recommended and rely on his recommendations]; cf. *Food Pro International, Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976 [intentional provision of professional services would not qualify as "accident" or "occurrence" under business general liability policy provision for property damage].)

b. *The Daley's claim for nuisance does not give rise to "personal injury" under the policies*

Under the Jennys' State Farm policies, "**personal injury** means injury, other than **bodily injury**, arising out of one or more of the following offenses: [¶] . . . [¶] c. wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, by or on behalf of its owner, landlord or lessor . . . ."

The Daleys' nuisance claim alleged, "The presence of the Plumbing Defects [defined to include plumbing leaks, mold growth, wood rot, pipe corrosion and other related damage] in or about the Property and the failure of said Defendants to disclose, report, investigate, remediate and repair the same constitutes a private nuisance . . . in that the Plumbing Defects were injurious to Plaintiffs and have interfered, and continue to interfere, with the use and enjoyment of the Property." The Jennys contend this nuisance claim is for the wrongful invasion of the Daleys' right of occupancy and thus constitutes a covered claim for personal injury. (See *Zelda, Inc. v. Northland Ins. Co.* (1997) 56 Cal.App.4th 1252, 1263-1264 ["[g]enerally, California courts have construed [the offenses of wrongful entry or eviction] 'as applying to tort claims arising out of the interference with an interest in real property,' such as trespass, nuisance, and noninvasive interferences with the use and enjoyment of property"]; *Martin Murietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1131 ["it seems manifest 'wrongful entry,' in the context of torts relating to the invasion of an interest in real property, includes trespass and may include nuisance, and that a reasonable insured would so understand the coverage"].)

Nuisance is "[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the

comfortable enjoyment of life or property . . . ." (Civ. Code, § 3479.) A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937; Civ. Code, § 3481; see generally Rest.2d Torts, § 821D.)

As the trial court recognized, the gravamen of the Daleys' nuisance claim, notwithstanding its label, was for fraudulent misrepresentation about, or fraudulent concealment of, defects at the Clara Street property at the time of sale. Indeed, the undisclosed plumbing defects identified as the source of the nuisance were at the heart of the dispute between the Jennys and the Daleys. Accordingly, to classify all damages sought by the Daleys' litigation as uncovered economic damages from the sale of property may well be correct.

Nonetheless, even were we to fully credit the Daleys' description of their claim -- a dubious proposition at best (see, e.g., *El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1348; *id.* at p. 1349 ["[w]here negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim"]) -- and were to accept the Jennys' position that a nuisance action generally falls within their policies' definition of "personal injury" because it arises out of an invasion of the right of enjoyment and use of property, coverage of the claim would be barred: The State Farm policies specifically define as "property damage" any "physical injury to or destruction of tangible property, including all resulting loss of use of that property" or "loss of use of tangible property that is not physically injured or destroyed, provided such loss of use is caused by physical injury to or destruction of other tangible property." Whether or not other types of nuisance claims may be covered "personal injury," the Daleys' claim is not. (See *Titan Corp. v. Aetna Casualty & Surety Co.* (1994) 22 Cal.App.4th 457, 473-474 [personal injury endorsement could not be interpreted to negate policy exclusion for property damage caused by pollution]; *Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal.App.4th 187, 210 [claim for pollution-related property damage excluded under policies that provided accident-based property damage coverage and occurrence-based personal injury coverage; "even

though there is no pollution exclusion to consider, we must give effect to the policies' distinction between property damage coverage and personal injury coverage. If we were to interpret the policies as providing occurrence-based personal injury coverage for pollution-related property damage that was not caused by accident, we would effectively nullify [the] distinction."].)

In sum, even if viewed as seeking noneconomic damages, the Daleys' nuisance claim to recover damage to their property and loss of use of the property is a claim for "property damage," covered only if the insureds' conduct was accidental or unintended. As discussed, the lawsuit alleges the Jennys' engaged in intentional (even if only negligent) conduct. Accordingly, summary judgment on this ground, as well, must be affirmed.

DISPOSITION

The judgment is affirmed. State Farm is to recover its costs on appeal.

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PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.